Kamalan a/l Shaik Mohd v Public Prosecutor

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41A-51–05 OF 2012
ZAMANI A RAHIM J
18 MARCH 2013

Criminal Procedure — Trial — Cross-examination — Whether accused had constitutionally guaranteed right to cross-examine all prosecution witnesses fully and completely — Whether allowing accused to only partially or incompletely cross-examine witness denied him of fair trial — Federal Constitution arts 5 & 8 — Criminal Procedure Code s 173(e)

The High Court in the instant appeal was concerned with the legal effect on the appellant ('accused') of his inability to cross-examine fully a material witness for the prosecution. This was the main ground the accused, a police investigating officer, raised in his appeal against conviction and sentence of six months' jail and RM3,000 fine imposed on him by the magistrate's court for releasing a lawfully-remanded detainee, Cheah Liau Khuan ('Cheah') without obtaining the prior instructions of his superiors. The offence fell under s 217 of the Penal Code. Cheah was a material prosecution witness in the s 217 trial. She was also the complainant in two corruption charges ('the corruption charges') against the accused in a separate matter of which the accused was acquitted. The accused's argument in the instant appeal was that he had wanted to, but did not have the opportunity, to cross-examine Cheah in the s 217 trial (i) to determine if she had a motive to entrap him (ii) to contradict her testimony with her evidence recorded in the corruption cases (iii) to determine if she was an accomplice and (iv) to examine the possibility of impeaching her credibility. The accused contended that pursuant to s 173(e) of the Criminal Procedure Code ('CPC') and arts 5 and 8 of the Federal Constitution ('Constitution') he had the right to fully and exhaustively complete his cross-examination of all the prosecution's witnesses. Although the prosecution conceded that it made a procedural error in failing to recall Cheah for cross-examination at the trial, it contended that the defence did have the opportunity to extensively cross-examine Cheah and that if she was required for further cross-examination the defence should have applied to have her recalled but it did not do so thereby giving the assumption that she was no longer required. The prosecution argued that substantial injustice had not occurred and urged the court to cure the procedural error under s 422 of the CPC.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the accused:

(1) The accused was deprived of putting his case to the fullest. No

opportunity was given to him to exhaustively complete his cross-examination of Cheah. This was a clear infringement of the mandatory provision in s 173(e) of the CPC and also of art 5(1) of the Constitution. The accused accordingly did not have a fair trial (see paras 34–35).

(2) An accused person had a constitutionally guaranteed right to a fair trial which included the right to cross-examine all witnesses produced by the prosecution fully and completely. There could not be a partial or incomplete cross-examination of the witnesses for the prosecution (see para 33).

[Bahasa Malaysia summary

Mahkamah Tinggi dalam rayuan ini adalah berkenaan dengan kesan undang-undang ke atas perayu ('tertuduh') terhadap ketidakupayaannya untuk memeriksa balas secara keseluruhan saksi material untuk pihak pendakwaan. Ini adalah alasan utama tertuduh, pegawai penyiasat polis, membangkitkan dalam rayuannya terhadap sabitan dan hukuman enam bulan penjara dan denda RM3,000 yang dikenakan ke atasnya oleh mahkamah majistret kerana melepaskan tahanan reman yang sah, Cheah Liau Khuan ('Cheah') tanpa memperolehi arahan-arahan ketua-tuanya terdahulu. Kesalahan terangkum di bawah s 217 Kanun Keseksaan. Cheah adalah saksi material pendakwaan di dalam perbicaraan s 217. Dia juga pengadu di dalam dua tuduhan ('tuduhan rasuah') terhadap tertuduh di dalam perkara berasingan yang mana tertuduh dibebaskan. Hujahan tertuduh dalam rayuan ini adalah bahawa dia hendak memeriksa balas, tetapi tidak berpeluang untuk memeriksa balas Cheah di dalam perbicaraan s 217 (i) untuk menentukan jika dia ada motif untuk memerangkap tertuduh (ii) untuk menyangkal testimoninya dengan keterangannya yang direkodkan di dalam kes-kes rasuah (iii) untuk menentukan jika dia adalah rakan jenayah dan (iv) untuk memeriksa kemungkinan mencabar kredibilitinya. Tertuduh berhujah bahawa berikutan s 173(e) Kanun Tatacara Jenayah ('KTJ') dan perkara 5 dan 8 Perlembagaan Persekutuan ('Perlembagaan') yang dia mempunyai hak sepenuhnya dan menyeluruh untuk melengkapkan pemeriksaan balasnya terhadap kesemua saksi pihak pendakwaan. Walaupun pihak pendakwaan mengakui yang ia telah membuat kesilapan prosedur kerana gagal untuk memanggil semula Cheah untuk pemeriksaan balas semasa perbicaraan, ia berhujah bahawa pembelaan mempunyai peluang untuk memeriksa balas secara lanjut dan bahawa jika dia dikehendaki untuk pemeriksaan balas selanjutnya pembelaan sepatutnya memohon untuk dia dipanggil semula tetapi ia tidak berbuat demikian dengan itu memberikan anggapan yang dia tidak lagi diperlukan. Pihak pendakwaan berhujah bahawa ketidakadilan tidak berlaku dan memohon mahkamah untuk mengatasi kesilapan prosedur di di bawah s 422 KTJ.

Diputuskan, menolak rayuan, mengetepikan sabitan dan hukuman dan membebaskan dan melepaskan tertuduh:

(1) Tertuduh dinafikan untuk membela kesnya dengan sepenuhnya. Tiada peluang diberikan kepadanya untuk melengkapkan keseluruhan pemeriksaan balasnya terhadap Cheah. Ini adalah perlanggaran yang jelas terhadap peruntukan mandatori s 173(e) KTJ dan juga perkara 5(1) Perlembagaan. Tertuduh dengan itu tidak mendapat perbicaraan yang adil (lihat perenggan 34–35).

(2) Tertuduh mempunyai hak terjamin berpelembagaan kepada perbicaraan yang adil yang mana melibatkan hak untuk memeriksa balas kesemua saksi yang dikemukakan oleh pihak pendakwaan dengan menyeluruh dan lengkap. Tidak patut terdapat pemeriksaan balas saksi-saksi yang tidak lengkap untuk pihak pendakwaan (lihat perenggan 33).]

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithambaran Pillai [1997] 3 MLJ 61, FC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (folld)

Maharaja of Kolhapur v S Sundaram Ayyar & Ors AIR 1925 Mad 497, HC (refd)

Meer Sujad Ali v Kashee Nath 6 WR 181 (refd)

Mraz v The Queen (1955) 93 CLR 493, HC (refd)

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)

PP v Ishak bin Hj Shaari & another appeals [2003] 4 MLJ 585, CA (refd)

S v McKenna 1998 (1) SACR 106 (C) (refd)

S v Motlhabane & Others 1995 (2) SACR 528 (B) (refd)

S v Msimango and Another [2009] 4 All SA 529 (GSJ); 2010 (1) SACR 544 (GSJ) (refd)

State v Khumalo Case No 110/12 dated 22 August 2012 (folld)

Tiriku Ram v State (Criminal Appeal No 841 of 2011) (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 10(a)(aa), 11(a)
Constitution of Singapore arts 9, 12
Criminal Procedure Code ss 173(e), 180(1), 422
Dangerous Drugs Act 1952 s 39B(1)(c)
Evidence Act 1950 s 138
Federal Constitution arts 5, 5(1), 8, 8(1)
Indian Evidence Act 1872 ss 146, 151, 152
Penal Code ss 193, 217

Ismail bin Mohamad (Tamil Salvan Tenappan with him) (T Tenappan & Co) for the appellant.

Suhaimi bin Ibrahim (Charanjit Singh a/l Mahinder Singh with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the prosecution.

Zamani A Rahim J:

[1] The appellant, a police sergeant ('the accused') was an investigating officer attached to Bukit Mertajam Police Station. Among his duties, was to investigate commercial crime cases.

[2] The accused was originally charged, at the instant of Suruhanjaya Pencegahan Rasuah Malaysia, with two offences under ss 10(a)(aa) and 11(a) of the Anti-Corruption Act 1997 respectively at Butterworth Sessions Court which ended with his acquittal. These are corruption cases.

[3] The accused too was indicted with two charges at Bukit Mertajam Magistrate's Court under ss 193 and 217 ('ss 193 and 217 charges') respectively under the Penal Code. The ss 193 and 217 charges against the accused were at the instant of the police and they read as follows:

1) S 193 charge

Bahawa kamu pada 19.9.2004 jam 8.00 pagi sehingga 22.9.2004 jam 4 petang di Pejabat Pegawai Penyiasat Ibu Pejabat Polis Daerah Seberang Perai Tengah, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, semasa jalankan siasatan bersabit Bukit Tengah Report 3671/2004, SPT/IP No. 2595/2004, kamu telah menyatakan di bawah S 119 Kanun Acara Jenayah iaitu catatan prosiding harian kes tersebut bahawa kamu (1) mengambil tangkapan bernama Cheah Liau Khuan KPT: 630809-07-5196 daripada lokap Balai Polis Kubang Semang pada 20.9.2004 dan 21.9.2004 untuk dijalankan soal siasat dan selepas itu dihantar balik ke lokap tersebut, (2) merakam percakapan di bawah S 113 tangkapan Cheah Liau Khuan pada 22.9.2004, (3) terima arahan pada 22.9.2004 daripada Pegawai Penyiasat Kanan IPD Seberang Perai Tengah C/Insp Martin William Fernandez untuk dibebaskan tangkapan bernama Cheah Liau Khuan dengan jaminan polis selama dua minggu tetapi sebenarnya tangkapan bernama Cheah Liau Khuan tidak pernah dimasukkan ke dalam lokap Balai Polis Kubang Semang, yang mana kamu ketahui atau mempercayai sebagai keterangan palsu atau tidak benar, maka dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah S 193 Kanun Keseksaan.

2) S 217 charge

Bahawa kamu pada 19.9.2004 jam 12 tengahari ah sehingga 6 petang Pejabat Pegawai Penyiasat Ibu Pejabat Polis Daerah Seberang Perai Tengah, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, semasa jalankan siasatan bersabit Bukit Tengah Report 3671/2004, SPT/IP No. 2595/2004, kamu telah didapati melepaskan tangkapan bernama Cheah Liau Khuan tanpa arahan pihak atasan kamu setelah memperoleh reman di bawah S 117 Kanun Acara Jenayah

A mulai 19.9.2004 sehingga 25.9.2004 daripada Pendaftar Mahkamah Majistret / Sesyen Butterworth, dengan niat menyelamatkan tangkapan daripada tindakan undang-undang, maka dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah s 217 Kanun Keseksaan.

B **[4]** Having called for his defence on both the above charges, the accused was acquitted and discharged in respect of s 193 charge. The prosecution did not file any appeal against this acquittal ie s 193 charge.

C **[5]** However, the accused was found guilty and convicted in respect of s 217 charge. He was sentenced to six months imprisonment from the date of conviction and a fine of RM3,000, in default three months imprisonment. Hence this appeal.

D **[6]** There are several grounds raised by the accused in his petition of appeal, and I found the accused's appeal is without merit, save on one issue, namely, the legal effect of an incomplete cross examination on a material witness for the prosecution. I adjourned the hearing for further submissions by the parties on this solitary issue.

E **[7]** At the continued hearing, learned counsel submitted that the accused is entitled to cross examine all the witnesses for the prosecution under s 138 of the Evidence Act 1950 ('EA') read together with s 173(e) of the Criminal Procedure Code ('CPC'). Learned counsel also argued that the accused has a F constitutional guaranteed rights under arts 5 and 8 of the Federal Constitution to complete his cross-examination of prosecution witnesses.

[8] Section 138 of the Evidence Act 1950 ('EA') — Order of examinations and direction of re-examination:

G (1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, *cross-examined* then, if the party calling them so desires, *re-examined*.

(2) The examination and cross-examination must relate to relevant facts, but H the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) …

(4) …

I **[9]** Section 173(e) of the Criminal Procedure Code ('CPC') provides as follows:

The accused shall be allowed to cross-examine all the witnesses for the prosecution.

[10] Federal Constitution:

Article 5 states:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) …
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) …

Article 8 states:

> 8(1) All persons are equal before the law and entitled to the equal protection of the law.

[11] The constitutional guaranteed rights under arts 5 and 8 is the accused's rights to equality and to exhaustively defend himself in a criminal trial. This include the accused's rights to challenge the prosecution witnesses in cross examination to seek the truth and to lay the foundation of the defence case to avoid being labelled as being a recent invention or an afterthought defence.

[12] Cross-examination has been described in various ways. It is as follows:

> Definition of cross-examination as per The 'Concise Oxford Dictionary', (10th Ed), defines 'cross-examine' as, 'question (a witness called by the other party) in a court of law to check or extend testimony already given'.
>
> As per 'Webster's Third New International Dictionary (1993)' defines 'cross-examine' as 'to examine by a series of questions designed to check the accuracy of answers to previous questions; examine closely or repeatedly; to examine (a witness who has testified for the other side in a legal action) esp. in order to disprove testimony already given'.
>
> 'It is imperative for the court to consider the legal effect of cross-examination which could not be completed. A passage in *17 Halsbury's Laws* (4th Ed) para 277 reads:
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> > Any party is entitled to cross-examination any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter had an opportunity of testing its truthfulness by cross-examination.

[13] According to *Sarkar on Evidence* (14th Ed), 1993 Vol 2 at p 1991 which cites the case of *Meer Sujad Ali v Kashee Nath* 6 WR 181, pp 182–183 where Norman J made the following remarks on the object and importance of cross-examination:

> The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood ….

[14] The latitude of cross-examination is considerable. The questions in cross-examination may be asked which tend (a) to test his accuracy, veracity or credibility, (b) to discover who he is and what is his position in life, or (c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to expose him to a penalty or forfeiture: see s 146. No questions which are indecent or scandalous and also which are intended to insult or annoy may be asked: see ss 151–152.

[15] Be that as it may, if the accused is denied or deprived to continue to cross-examine the material witness for the prosecution that means the accused's constitutional guaranteed rights has been trampled. The accused is not getting a full and fair trial which of course will vitiate the entire proceedings. The material witness in the present case is one Cheah Liau Khuan, SP6. She was the complainant in the corruption case which was heard at the Butterworth Sessions Court. According to learned counsel, the cross-examination of SP6 is yet to be completed among others, namely:

(a) her motive to trap the accused cannot be ruled out as she was the complainant in the corruption cases which the accused obtained the acquittal;

(b) whether she is an accomplice;

(c) to confront and contradict her evidence recorded in the corruption cases tried at the Butterworth Sessions Court; and

(d) the possibility of impeaching her credibility.

[16] To support his contention, learned counsel relied on a recent and persuasive South Gauteng High Court, Johannesburg, Republic of South Africa, a decision of Justice Wepener in *State v Khumalo* Case No 110/12 dated 22 August 2012, as to how the case came before him and the issue of inability of the accused to complete the cross-examination of the complainant, Wepener J wrote:

> (1) This matter comes on review pursuant to s 304A of the Criminal Procedure Act 51 of 1977 (the CPA). The accused was charged with a count of robbery and pleaded not guilty. The regional magistrate in the court below (Germiston Regional Court) advised that the magistrate of the district court, Germiston, commenced the trial on 25 April 2012 and

concluded it on 11 June 2012 when the accused was found guilty and referred to the regional court pursuant to the terms of s 116 of the CPA, for sentence.

(2) Prior to imposing a sentence the regional magistrate noticed that after the complainant had given her evidence in chief, the witness was cross-examined by the defence attorney. The matter was postponed to a subsequent date for further cross-examination of the complainant by the accused's legal representative. On the subsequent trial date the complainant failed to attend court and the State's case was closed. The accused's legal representative applied for the discharge of the accused in the district court pursuant to the provisions of s 174 of the CPA by virtue of the fact that the accused's rights to cross-examine was infringed and that such an infringement was fatal to the State's case. The district magistrate, however, refused such a discharge and the accused thereafter closed his case without leading any evidence.

[17] His Lordship expressed his view that failure to complete cross-examination of a witness in a criminal trial amounts to the accused not having a fair trial. This is how His Lordship said, inter alia:

> In my view an accused who is not able to cross-examine a witness due to the absence of that witness at a continuation of the hearing, does not receive a fair trial in the event of the trial proceedings in the absence of the witness whose cross-examination was not completed.

[18] For his view, Wepener J found support from the former Chief Justice of the Republic of South Africa, as a puisne judge, said in *S v McKenna* 1998 (1) SACR 106 (C) at 118G:

> The short answer to this submission is that the rights to 'adduce and challenge evidence' is not dependent upon the result. It is a rights which is guaranteed by the Constitution which must be complied with in all criminal trials. There is no place for the so-called no-difference rule under our Constitution. The rights to challenge evidence which is essential to a fair trial can never be dependent upon the result. Courts should not speculate on what would have been the effect of challenging the evidence.

[19] Also in *S v Motlhabane & Others* 1995 (2) SACR 528 (B) although Khumalo J applied a different test. He said at p 532I:

> The death of a State witness during the process of cross-examination results in the failure of the accused to exercise his rights to challenge sufficiently the evidence of that witness. Use of untested evidence against the accused will result in the infringement of that rights. Applying the above in the present case, I am of the view that even though Jeannet Seoposengwe had been extensively cross-examined before she died, it is difficult to predict what would have happened if such

cross-examination had continued. Moreover, the witness had not been cross-examined on the question of identification adequately. The accuseds' rights to challenge her evidence has been adversely affected.

[20] Support of Wepener J's view may also be found in the judgment of Moshidi J in *S v Msimango and Another* [2009] 4 All SA 529 (GSJ); 2010 (1) SACR 544 (GSJ) where he said at para 26:

> I have come to the conclusion that no probative value should be attached to evidence where cross-examination of a witness was absent, for whatever reason, including illness or death.

[21] The cases of *State v Khumalo*, *S v McKenna*, *S v Motlhabane*, are on all fours with the case before this court wherein the witness for the prosecution is yet to complete her evidence in cross-examination by the accused. As such no probative value should be attached to her evidence.

[22] Learned deputy acknowledged that there was omission or procedural error made by the prosecution. However learned deputy argued that learned defence counsel should have made an application to recall SP6 or alerted the court that SP6 was still required by him for further cross-examination. As there was no such application or reminder, assumption may be made that the defence was no longer minded or interested to proceed with the cross-examination. Learned deputy went on to reinterate that SP6 had been extensively cross-examined by the defence and her evidence had been substantially completed. To support his argument learned deputy relied on the Federal Court case of *Dr Shanmuganathan v Periasamy s/o Sithambaran Pillai* [1997] 3 MLJ 61 and an Indian case of *Maharaja of Kolhapur v S Sundaram Ayyar & Ors* AIR 1925 Mad 497. It was submitted that a substantially completed cross-examination of the witness may be accepted in evidence. Bear in mind that the aforesaid Malaysian and Indian cases were decisions in civil cases.

[23] Further, learned deputy cited the case of *Public Prosecutor v Ishak bin Hj Shaari & another appeals* [2003] 4 MLJ 585 which relates to an error on the standard of proof on the prosecution at the end of its case and in Criminal Appeal No M-09–18 of 1997 at the end of the trial. It is said that not all omission or error would lead to substantial injustice which cannot be cured under s 422 of the CPC. Learned deputy quoted the following passage at p 598 in his written submission as follow:

> The CPC is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the CPC is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if

he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconseguential errors and omissions in the trial are regarded as venal by the CPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CPC is based. The modern trend should be to swing away from technicality and a greater endeavour should be made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused person, fair to the State and fair to the society for whose protection penal laws are made and administered (see *Willie (William) Slaney v State of Madhya Pradesh (S)*). In order to interpret s 422 the whole provisions of the CPC must be looked at in totality and the purposive approach should be adopted so as to promote the basic principle on which the CPC is based.

[24] And at p 599 the court said:

… In our view, having regard to the aforesaid object of the CPC, the issue whether or not the misdirection has occasioned a failure of justice can be resolved by seeking answers to certain corollary questions, namely, did the accused have a fair trial, did he know what he was being tried for and whether the allegations and facts were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself? If the answers are in the affirmative, the only conclusion is that there has been no prejudice and failure of justice. If the answers are in the negative, the trial must necessarily be treated as vitiated. If there exists a reasonable doubt regarding the answers, the benefit of doubt must be given to the accused ….

[25] The court went on to say at p 600 as follows:

… That being the case, guided by the Indian cases, the question we should ask ourselves is whether the trials had been conducted in substantial compliance with the CPC or in a manner substantially different from that prescribed. If the trials were conducted in a manner or mode different from that prescribed by the CPC the trials were bad and the question of curing an irregularity did not arise, but if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the course of such conduct the irregularity could be cured under s 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC ….

[26] In the instant case it was argued by learned deputy that the accused was given full opportunity to put up his defence. No inhibition was placed for him to recall SP6 to continue the cross-examination. According to learned deputy, an oversight to recall SP6 for cross-examination cannot be equated that the accused do not get full and fair opportunity to defend himself or substantial injustice has occurred. As there is no failure of justice, the omission or

procedural error is curable under s 422 of the CPC. In the words of Mohd Noor Ahmad JCA who delivered the judgment concluded as follows:

> Therefore, we conclude that the misdirection on a standard of proof in a trial which has been conducted in substantial compliance with the CPC is curable under s 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned of justice.

[27] The cases of *Dr Shanmuganathan* and *Maharaja of Kolhapur*, which are relied upon by learned deputy are civil cases decision whereby standard of proof is on the balance of probabilities which is lower than the standard of proof in the criminal cases, as in this case, which is beyond reasonable doubt. In response to this, learned deputy cited an Indian criminal case of *Tiriku Ram v State* (Criminal Appeal No 841 of2011). It was a murder case where a witness was yet to be cross-examined, as he could not be traced. Relying on *Sarkar on Evidence* at p 2170 which states that:

> The evidence of a witness who could not be subjected to cross examination due to his death before he could be cross examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testitmony, it ought not to be rejected entirely ….

[28] As can be seen in the criminal cases of *Tiriku Ram* and *Ishak bin Hj Shaari*, nowhere in both judgments a constitutional guaranteed rights of the accused under the Indian or Malaysian Constitution was considered and discussed.

[29] The constitutional guaranteed rights of the accused under arts 5 and 8 of our Federal Constitution was lucidly discussed by Gopal Sri Ram FCJ in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631. The accused was convicted by the High Court for trafficking of drugs under s 39B(1)(c) of the Dangerous Drugs Act. He was sentenced to death. His appeal to the Court of Appeal was dismissed. He took up a further appeal to the Federal Court. One of the grounds of appeal was that, the trial judge ruled that he did not wish to hear the accused's submission at the close of the prosecution case as he was satisfied that a prima facie case under s 180(1) of the Criminal Procedure Code has been made out by the prosecution.

[30] The accused contended that he had a constitutionally guaranteed rights to a fair procedure by virtue of art 5(1) of the Federal Constitution and the trial judge's ruling had violated this rights.

[31] Having considered the rule of construction of the Federal Constitution

and several other authorities including the judgment in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, when dealing with arts 9 and 12 of the Singapore Constitution which are identical to arts 5 and 8 of our Constitution respectively, Lord Diplock said:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in Their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

[32] Gopal Sri Ram FCJ concluded that 'It is clear from this passage the rules of natural justice, which is the procedural aspect of the rule of law, is an integral part of arts 5(1) and 8(1). In short, procedural fairness is incorporated in these two articles'.

His Lordship Gopal Sri Ram FCJ also went on to say:

> [18] Drawing the threads together, it is clear from the authorities that it is a fundamental rights guaranteed by art 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed rights to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he then was) in *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242, where he held that:
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> > Article 5(1) of our Constitution does imply in favour of an accused person the rights to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this rights then, in the words of Sandhawalia CJ in *Madheshwardhari Singh v The State (ibid)* (*Madheshwardhari Singh and Anor v State of Bihar* AIR (Pat) 1986 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.
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> [19] We must consider the impact of what we have said thus far on the facts of the instant case. In our judgment, the constitutionally guaranteed rights in an accused to a fair trial includes his rights to make a submission of no case at the close of the

prosecution's case. It is a rights that he or she may waive. But he or she cannot be deprived of it. That unfortunately is what happened here. The accused accordingly did not have a fair trial and art 5(1) was violated. Following *Public Prosecutor v Choo Chuan Wang* he is entitled to have his conviction set aside on this ground.

[33] Guided by the provision of s 173(e) of the Criminal Procedure Code ('CPC') and a well reasoned and illuminating judgment of Gopal Sri Ram FCJ in *Lee Kwan Woh* and the persuasive decision of *State v Khumalo*, it is my considered judgment that an accused in a criminal trial has a constitutionally guaranteed rights to a fair trial which include to complete cross examination of a material witness, in this case, SP6. This rights of cross-examination is mandatory as the word 'shall' is used in s 173(e) of the Criminal Procedure Code ('CPC'). The accused's rights encompasses to cross-examine all the witnesses produce by the prosecution, if he deems fit. The expression 'all the witnesses' in s 173(e) means firstly, any number of witnesses tender by the prosecution and secondly, the cross-examination of each and every witness, if so desires by the accused, must be in full or complete. There cannot be a partial or an incomplete cross-examination of the prosecution witness or witnesses.

[34] In the present case, the accused is yet to complete his cross-examination of SP6. SP6 must be offered and produced, not by the defence but by the prosecution for the purpose of the former completing his rights of cross-examination of SP6. Without an opportunity being offered or made available for continued cross-examination is not a sufficient compliance with the requirements of the law. Following next, is re-examination of SP6 if so desires by learned deputy. The trial is still at the prosecution stage. To the chagrin of the accused, the prosecution acknowledged its oversight for not recalling SP6 for further cross examination. It deprived the accused to put his case to the fullest. The accused, accordingly, do not have a fair trial and art 5(1) is violated. On the facts of this case, a constitutional guaranteed rights of the accused has been found to be flouted. 'If there is an infraction of these rights, the accused is entitled to an acquittal' per Gopal Sri Ram FCJ in *Lee Kwan Woh* [2009] 5 MLJ 301.

[35] Further, no opportunity was given to the accused to exhaustively complete cross-examination is a clear infringement of the mandatory provision of s 173(e) of the Criminal Procedure Code (CPC). The accused 'has not had what the law says that he shall have', thus justice has been miscarried — commonly called miscarriage of justice. Speaking for the High Court of Australia in *Mraz v The Queen* (1955) 93 CLR 493 Fullagar J said at p 514 in the following terms:

> … every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost

a chance which was fairly opened to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law.

[36] Accordingly, the accused's conviction and sentence is set aside. The accused is hereby acquitted and discharged.

Appeal allowed, conviction and sentence set aside and accused acquitted and discharged.

Reported by Ashok Kumar